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In The

# Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.

*Petitioner,*

v.

FEDERICO PENA, SECRETARY OF DEPARTMENT OF TRANSPORTATION, et al.,

*Respondents.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

## BRIEF AMICUS CURIAE OF NATIONAL COALITION OF MINORITY BUSINESSES IN SUPPORT OF RESPONDENTS

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## BRIEF AMICUS CURIAE OF NATIONAL COALITION OF MINORITY BUSINESSES IN SUPPORT OF RESPONDENTS

## INTEREST OF AMICUS CURIAE

National Coalition of Minority Businesses (NCMB) is a nonprofit organization composed of minority-owned businesses, encompassing a wide cross section of racial and ethnic minorities, and individual leaders of a number of other minority trade associations. The members of NCMB include disadvantaged businesses that participate in or have graduated from the Small Business Administration's § 8(a) program, as well as other businesses that have been certified as disadvantaged business enterprises (DBEs), 15 U.S.C. § 644(g) (1988) for purposes of Section 502 of the Small Business Act and/or as small disadvantaged businesses

(SDBs) under the Department of Defense and other federal programs.

NCMB's purposes include promoting the interests of minority businesses, representing the interests of minority businesses before Congress and federal agencies, and collecting and distributing information about issues of concern to minority businesses to members of industry groups, the press and the public. Members of NCMB have repeatedly testified before Congress regarding federal procurement statutes such as the Small Business Administration SDB, DBE and minority business enterprise (MBE) programs which are designed to open opportunities to minority businesses previously foreclosed from participation due to bias or other institutional barriers.

It is important to understand the historical context of the statute that is at issue here, as well as of a host of related statutes that have been enacted to redress the problem of discriminatory exclusion from government procurements. The core concept of providing assistance to businesses owned or controlled by "socially and economically disadvantaged" persons dates back to 1969, when President Nixon issued an executive order directing the Small Business Administration to use its authority under § 8(a) of the Small Business Act to assist small business concerns owned and controlled by such disadvantaged individuals.[1] President Nixon issued this executive order, rather than awaiting congressional action, because of the urgent need to address the urban unrest and other serious problems resulting from discrimination against and disparate treatment of minorities. He recognized the undeniable historical fact that minorities had been unlawfully denied access to participation in the free

[1] Exec. Order No. 11458, 3 C.F.R. 779 (1966-1970 Comp.); Exec. Order No. 11518, 3 C.F.R. 907 (1966-1970 Comp.); Exec. Order No. 11625, 3 C.F.R. 616 (1971-1975 Comp.).



enterprise system and indeed had been deprived of all basic civil rights.

The Congress and President Johnson acknowledged the continuing and disgraceful existence of *de jure* racial discrimination, which they sought to rectify by enacting the major civil rights legislation of the 1960s. President Nixon realized that even this landmark legislation was not enough to remove the effects of hundreds of years of oppression and discrimination against racial minorities, nor to solve the ongoing economic problems of racial bigotry, division and unrest. Thus, it was essential to bring minority groups into the economic mainstream by providing real equality of opportunity to participate in the free enterprise system. Since the federal government is the nation's largest purchaser of goods and services, President Nixon sought to use this market to nuture "black capitalism" (as he called it), to provide minorities with a "business stake in America," and to fulfill the unrealized goals of the civil rights legislation.

In the 1970s Congress undertook a lengthy review of the administrative program created by this executive order and recognized the need to improve and strengthen this program. Thus, for example, the minority set-aside provisions of the Public Works Employment Act of 1977, 42 U.S.C. § 6705 (1988) which were upheld by this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), were expressly linked by Congress to the ongoing § 8(a) program and were motivated in part by Congress' concern over the limited effectiveness of that program in significantly increasing minority business participation in government procurements. *See id.* at 463-67.

Similarly, in 1978, when Congress codified and strengthened the Small Business Administration's program by, among other things, enacting the challenged provisions of Section 502 of the Small Business Act, Congress recognized that minorities continued to lack opportunity to participate fully in the free enterprise system or to secure federal government contracts. Congress' well-

supported findings in this regard are set forth in the Small Business Act itself. *See* 15 U.S.C. § 631(f)(1).

Throughout the 1980s and early 1990s these federal programs to remedy the effects of discrimination and to bring minority groups into the economic mainstream have been the subject of intense and continuing scrutiny by Congress, by the Executive Branch and by the public at large, in each instance resulting in new and additional efforts to remedy the problem. Although these federal programs have resulted in significant gains for disadvantaged businesses, the evidence clearly shows, and every Congress and Administration since the late 1960s has correctly recognized, that the need for these programs has not ended because minorities continue to suffer the effects of systematic and institutional racial discrimination. As recently as September 16, 1994, President Clinton recognized, by Executive Order No. 12928, the continuing need "to enforce vigorously the letter and spirit of public laws that promote increased participation in Federal procurement by Small Businesses Owned and Controlled by Socially and Economically Disadvantaged Individuals."[2]

The federal programs in question are a matter of vital importance to the members of NCMB and to the minority business community at large, as well as to the minority community and the nation as a whole. For example, during fiscal year 1993, the 8(a) program had 4,848 participating business concerns. These 8(a) firms employed 105,800 individuals and won $4.3 billion worth of federal contracts, but even more important, the federal programmatic support has served as a catalyst to enable such firms to compete in the commercial market and earn 57% (or $7.3 billion) of their revenues outside the 8(a)

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[2] Exec. Order No. 12928, Promoting Procurement with Small Business Owned and Controlled by Socially and Economically Disadvantaged Individuals, Historically Black Colleges and Universities, and Minority Universities (Sept. 16, 1994).



program. The existence and success of these and other disadvantaged businesses that benefit from statutes such as Section 502 is a matter of vital economic importance to the minority community as a whole. These businesses have played a major role in providing direct and indirect employment opportunities for minorities, and curtailment of necessary federal programs would therefore have a devastating impact on a major segment of the minority community and the economic health of numerous diverse communities throughout the nation.

Since the arguments raised by Petitioner and its supporting amici threaten the very existence of vital and necessary programs such as Section 502 of the Small Business Act, the issues in this case are of great significance to NCMB.[3]

## SUMMARY OF ARGUMENT

The courts below properly held that Section 502 of the Small Business Act, 15 U.S.C. § 644(g) (1988), which provides for the establishment of annual goals for federal procurement from disadvantaged business enterprises (DBEs), is clearly constitutional. This Court has long recognized that Congress has the power to identify and redress the effects of past or present racial discrimination on public contracting, and that Congress' decision to use racial or ethnic criteria in achieving these remedial purposes is entitled to substantial deference. *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The use of race and ethnicity here simply as rebuttable factors in determining whether an individual is socially disadvantaged within the meaning of Section 502 is in fact a considerably more limited use of racial and ethnic criteria than that upheld as an appropriate remedial measure in *Fullilove*. Indeed,

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[3] Pursuant to Rule 37 of the Rules of this Court, letters reflecting the written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

one of the dissenting Justices in *Fullilove* expressly distinguished the category of Minority Business Enterprises (MBEs) in that case (in which categorization was based solely on race) from the more limited and acceptable use of race as but one factor in defining DBEs under the Small Business Act. *See Fullilove*, 448 U.S. at 335 n.6 (Stevens, J., dissenting).

When Congress enacted Section 502 in 1978, Congress had ample evidence that racial minorities continued to lack equal opportunity to compete for federal government contracts due to barriers erected by decades of severe and odious racial discrimination. Much of this evidence was discussed in *Fullilove* itself, and led Justice Powell to note that "a court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received." *Fullilove*, 448 U.S. at 506 (Powell, J., concurring).

In the years following the enactment of Section 502, Congress has continued to revisit the issue of racial discrimination and disadvantaged business enterprises. In 1988, Congress amended Section 502 to provide minimum government-wide goals for participation by small businesses and DBEs. Moreover, Congress has conducted extensive and repeated oversight hearings on issues related to DBEs, considering the views of both proponents and opponents of the DBE provisions of the Small Business Act. These facts should alleviate any concerns that Congress has given merely "perfunctory consideration" to the DBE provisions challenged here. *See Fullilove*, 448 U.S. at 550 (Stevens, J., dissenting).

In short, this Court should reaffirm *Fullilove* and uphold the challenged DBE provisions of the Small Business Act. Failure to do so would cause enormous damage



to thousands of DBE companies (and hundreds of thousands of their employees) that have made major investments of time and money in reliance upon the statutory promise that DBEs will receive the "maximum practicable opportunity" to participate in federal contract awards. *Fullilove* was correctly decided and should be reaffirmed based on settled principles of stare decisis and the continuing need for remedial measures.

## ARGUMENT

### I. CONGRESS HAS THE AUTHORITY TO IDENTIFY AND REDRESS THE EFFECTS OF SOCIETY-WIDE DISCRIMINATION WITH RESPECT TO FEDERAL PROCUREMENT

In *Fullilove*, this Court upheld a 10% set-aside for MBEs which was contained in Section 103(f)(2) of the Public Works Employment Act (PWEA), Pub. L. 95-28, 91 Stat. 116, 42 U.S.C. §§ 6701-6736 (1988). The PWEA provided federal funds for local public works projects and required that the state and local governments receiving these funds expend at least 10% on goods and services of MBEs. Unlike the DBEs at issue in this case (where race is only one factor in defining the class of disadvantaged persons), MBEs were defined simply as businesses owned by members of specified minority groups.

The principal opinion in *Fullilove*, written by Chief Justice Burger, first asked "whether the *objectives* of this litigation are within the power of Congress." 448 U.S. at 473 (emphasis in original). The Chief Justice noted that the PWEA imposed obligations on prime contractors, as well as state and local governments, because "when the procurement practices of the grantee involve the award of a prime contract to a general or prime contractor, the obligations to assure minority participation devolve upon the private contracting party." *Id.* at 474. The principal

opinion found that "[i]nsofar as the MBE program pertains to the actions of private prime contractors, the Congress could have achieved its objectives under the Commerce Clause" because "[t]he legislative history of the MBE provision shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce." *Id.* at 475-76.

With respect to state and local governments, however, the principal opinion declined to rely on the Commerce Clause as the source of Congress' authority. *See Fullilove*, 448 U.S. at 476 (noting that "there are limitations on the reach of the Commerce Power to regulate the actions of state and local governments"). Instead, the principal opinion concluded that "[i]nsofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment." *Id.* at 478. The Chief Justice stated:

> Although the [PWEA] recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws.

*Id.*



Petitioner and its supporting *amici* argue that *Fullilove* is inapplicable here because it "addressed Congressional power under § 5 of the Fourteenth Amendment, which is not at issue in this case." Pet. Br. at 32. Thus, one amicus points out that "[w]hile the MBE program in *Fullilove* concerned the ability of a *state* to receive federal funds, the DBE program under review here concerns incentive payments to *individuals* who employ certified DBE's." Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 18 (emphasis in original).

These attempts to distinguish *Fullilove* are meritless. *First*, the MBE provisions in *Fullilove* did not involve only Congressional authority with respect to state and local governments; on the contrary, the principal opinion in *Fullilove* also found that Congress had adequate authority under the Commerce Clause to impose these provisions on private contractors. Nothing in *Fullilove* suggests that the authority of Congress with respect to such contractors is more limited than with respect to state and local governments. If anything, the principal opinion in *Fullilove* indicates that federalism concerns might impose greater limitations on Congressional authority over state and local governments.

*Second*, as the district court correctly determined, the DBE program at issue here falls within Congress' Section 5 power to "remedy the effects of disabling discrimination." Pet. App. 34. This Court has held that "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). In *United States v. Guest*, 383 U.S. 745 (1966), a majority of the Court expressed the view that Congress has the discretion under Section 5 to enact legislation proscribing private conspiracies even where state officers or others acting under color of state law are not involved. 383 U.S. at 761

(Clark, J., joined by Black and Fortas, J.J., concurring); *id.* at 782 (Brennan, J., joined by Warren, C.J., and Douglas, J., concurring). Thus, Congress' Section 5 power is not limited to regulation of state action.[4] Moreover, even if state action were required, this requirement is satisfied here because the purpose of the DBE provisions is to remedy the effects of society-wide discrimination, including discrimination perpetuated by state action.

*Finally*, even if Section 5 were inapplicable to Congress' attempts to redress the effects of prior discrimination in the area of federal procurement, it is clear that

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[4] Congress has asserted the authority, pursuant to Section 5 of the Fourteenth Amendment, to preclude discrimination by private parties. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249 (1964). In *Heart of Atlanta Motel*, a majority of the Court did not reach the issue of whether Section 5 provided adequate authority for enactment of the Civil Rights Act of 1964, finding that the commerce power was a sufficient basis for the statute. *Id.* at 250; *see also id.* at 279 ("Because the Civil Rights Act of 1964 as applied here is wholly valid under the Commerce Clause and the Necessary and Proper Clause, there is no need to consider whether this Act is also constitutionally supportable under Section 5 of the Fourteenth Amendment. . . . ") (Black, J., concurring). Two members of the Court, however, would have squarely held that Congress had authority under Section 5, as well as the Commerce Clause, to enact this legislation. *See id.* at 280 (Douglas, J., concurring); *id.* at 293 (Goldberg, J., concurring).

The present case need not resolve the issue left open in *Heart of Atlanta Motel* because here Congress has not sought to preclude private discrimination. Instead, Congress has merely sought to provide equal opportunity to minorities and other disadvantaged persons to participate in the area of federal procurement, which is funded in part by the tax revenues of minority citizens. Congress' power to enforce equal protection guarantees surely is broad enough to ensure that federal procurement activities do not perpetuate the effects of prior discrimination which has deprived minorities and other disadvantaged persons of equal protection of the law.



Congress has equally broad remedial powers to achieve these objectives under other constitutional provisions. For example, in *Fullilove* Chief Justice Burger noted that the Court's review of the MBE provisions must be conducted "with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States,' " as well as to enforce the Fourteenth Amendment. 448 U.S. at 472; *see also Metro Broadcasting v. FCC*, 497 U.S. 547, 563 (1990) (*Fullilove* held that "deference was appropriate in light of Congress' institutional competence as the national legislature.").[5]

*Fullilove* held that the MBE set-aside was within Congress' Section 5 power not because state or local governments were engaging in intentional discrimination or other unlawful conduct but because Congress had reasonably determined that minority businesses attempting to compete for local public works projects were subject to "barriers to competitive access which had their roots in racial and ethnic discrimination." 448 U.S. at 478. It would be utterly illogical, as well as contrary to principles of federalism, to hold that Congress somehow has less power to eradicate the same effects of past discrimination as they appear in the area of federal procurement.

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[5] The challenged DBE provisions here are also valid as an exercise of Congress' powers under the Thirteenth Amendment. *See Fullilove*, 448 U.S. at 510 (Powell, J., concurring) ("[T]he Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination."). As pointed out by Justice Powell in his concurrence, the Thirteenth Amendment clearly provides Congress with the power to enact legislation regarding private discrimination. *Id.* at 500 (Powell, J., concurring) (citing *Runyon v. McCrary*, 427 U.S. 160, 168-70 (1976)).

Any doubts as to the applicability of *Fullilove* here are resolved by this Court's decision in *Metro Broadcasting*, which upheld the constitutionality of certain FCC policies that treated minority ownership as a favorable factor in decisions regarding license applications. The *Metro Broadcasting* Court specifically rejected the contention that *Fullilove* was applicable only to Congress' exercise of its authority pursuant to Section 5 of the Fourteenth Amendment. 497 U.S. 563 n.11. Moreover, the Court also rejected the argument, raised again by Petitioner and its amici here, that Congress' power to redress racial and ethnic discrimination is no broader than that of state and local governments under *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The Court stated:

> *Croson* cannot be read to undermine our decision in *Fullilove*. In fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments.

*Metro Broadcasting*, 497 U.S. at 565.[6]

*Metro Broadcasting* held that all benign race-conscious measures mandated by Congress, whether or not remedial, are subject to intermediate scrutiny. NCMB submits, however, that the correctness of this holding is not the

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[6] The dissent in *Metro Broadcasting* provides no support for Petitioner's position here. The dissent found that the "considerable lattitude" enjoyed by Congress under *Fullilove* was inapplicable to the FCC minority preference policies since those policies did not involve Congress' powers under § 5 of the Fourteenth Amendment, nor did they involve congressional measures seeking to remedy identified past discrimination. See 497 U.S. at 605-07 (O'Connor, J., dissenting). The present case is like *Fullilove*, and unlike *Metro Broadcasting*, in both those respects.



real issue before the Court in the case at bar. Rather the issue is whether Congress, unlike state or local governments, has the power "to identify and redress the effects of society-wide discrimination" by using the type of remedies upheld in *Fullilove*. *See Croson*, 448 U.S. at 720. If the answer to this question is affirmative, as it must be under *Fullilove*, *Croson* and *Metro Broadcasting*, then the challenged DBE provisions here survive either strict or intermediate scrutiny. Indeed, in *Fullilove* itself, Chief Justice Burger noted that the MBE provisions of the PWEA (which, as shown below, raise more significant constitutional concerns than do the challenged DBE provisions in this case) would survive either type of scrutiny. *See* 448 U.S. at 492.

## II. THE EVIDENTIARY REQUIREMENTS OF *FULLILOVE* ARE SATISFIED HERE

The principal opinion in *Fullilove* contains an extensive review of the legislative history not only of the PWEA, but of other administrative and legislative programs designed to promote minority opportunities, particularly those related to Section 8(a) of the Small Business Act. *See* 448 U.S. at 463 ("The legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity."). Based on this review, the Chief Justice concluded that "Congress had abundant evidence [when it enacted the PWEA in 1977] from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Id.* at 477-78. The Chief Justice further noted that "much of this history related to the experience of minority businesses in the area of federal procurement." *Id.* at 478; *see also id.* at 506 ("In light of these

legislative materials and the discussion of legislative history contained in THE CHIEF JUSTICE'S opinion, I believe that a court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received.") (Powell, J., concurring).

*Fullilove* thus clearly establishes that when in 1978 Congress first amended the Small Business Act to require federal agencies to provide the "maximum practicable opportunity" for DBEs to participate in the performance of federal contracts, it had ample evidence that federal procurement practices were perpetuating the effects of prior discrimination. *See* Pub. L. No. 95-507, 92 Stat. 1770 (1978). The legislative history notes that "in many, but not all, cases status as a minority can be directly and unequivocally correlated with social disadvantagement and this condition exists regardless of the individual, personal qualities of that minority person." H.R. Conf. Rep. No. 95-1174, 95th Cong., 2nd Sess., *reprinted in* 1978 U.S.C.C.A.N. 3882. It also notes that "other Americans may also suffer from social disadvantagement because of cultural bias. For example, a poor Appalachian white person who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons, may similarly be found socially disadvantaged, provided that the conditions leading to such disadvantagement are beyond the ability of the person to control." *Id.*

This legislative history demonstrates that Congress was not engaging in racial stereotyping or simply favoring certain racial groups over others. Rather Congress was attempting to remedy the effects of discrimination by identifying a "class of socially or economically disadvantaged persons [which] neither included all persons in the racial class nor excluded all nonmembers of the racial



class. Race was used as no more than a factor in identifying the class of the disadvantaged." *Fullilove*, 448 U.S. at 535 n.6 (Stevens, J., dissenting).

The legislative history also shows that Congress has not given merely "perfunctory consideration" to the DBE classifications at issue here. *See Fullilove*, 448 U.S. at 550 (Stevens, J., dissenting). Rather Congress has given serious and continuing attention to the effects and implications of the DBE provisions of federal law. For example, the Report of the Senate Committee on Environment and Public Works, which accompanied the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), states that "[t]he Committee has considered extensive testimony and evidence on the bill's DBE provisions, and has concluded that this provision is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry." S. Rep. No. 100-4, 100th Cong., 1st Sess., *reprinted in* 1987 U.S.C.C.A.N. 76. Moreover, the Committee also considered the views and perspectives of nonminorities impacted by the DBE provisions:

> The DBE program implemented by the Department of Transportation following enactment of section 105(f) operates primarily as a subcontracting program, under which prime contractors must make good faith efforts to achieve DBE subcontracting goals. The Committee has studied the materials presented by nonminority subcontractors regarding the program's impact on their businesses. The increased funding for highway and mass transit construction projects has increased the opportunities for subcontractors to compete, and the good faith efforts provision of the program assures that the program does not operate as a quota. Also, since DBE firms compete in many areas of subcontracting,

> any burden that might be imposed by this program is spread among different groups of subcontractors.

1987 U.S.C.C.A.N. 76.

Congress has held numerous and extensive oversight hearings to determine the impact of and continuing need for the DBE provisions.[7] Congress has also conducted a nationwide survey of DBEs that had participated in the Small Business Administration 8(a) program.[8] Based on testimony and evidence from these and many other sources, including annual reports from federal agencies regarding the attainment of DBE contracting goals, Congress has concluded that the DBE provisions remain necessary to meeting the objective of "promot[ing] the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy." 15 U.S.C. § 631(f)(2)(A); *see* 1987 U.S.C.C.A.N. 76 (despite progress

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[7] See, e.g., *Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program Before the Senate Comm. on Small Business*, 98th Cong., 1st Sess. (1983); *Hearings on the State of Hispanic Small Business in America Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business*, 99th Cong., 1st Sess. (1985); *Hearings on Minority Enterprise and General Small Business Problems Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Comm. on Small Business*, 99th Cong., 2d Sess. (1986).

[8] Report of the Senate Committee on Small Business, Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program (hereinafter "8(a) Survey"), S. Rep. No. 394, 100th Cong., 2d Sess. App. A (1987).



resulting from DBE provisions "barriers still remain, preventing minorities and women from successfully competing in the industry").[9]

Petitioner asserts that any "pattern or practice of racial discrimination . . . was cured long ago." Pet. Br. at 36. Unfortunately, there is more than ample evidence to contradict this unsupported statement. The results of institutional discrimination continue – minorities still own a disproportionately low number of businesses in the United States and to receive a disproportionately small amount of business revenue.[10] For example, in 1987 fewer than 1% of the 89,897 American construction firms

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[9] The Senate's 1986 Survey of 8(e) Program Graduates demonstrated that "graduated" firms (*i.e.*, those that had completed the limited participation term in the 8(a) program) faced an inordinately high failure rate. 8(a) Survey, *supra* note 8. This is further evidence that disadvantaged businesses continue to face institutional bias and discrimination as substantial barriers to their access to governmental and private markets, credit and capital.

[10] As one commentator notes:

> The black business participation rate is only about one-quarter of the national average. While blacks make up twelve percent of the population, they own only two percent of all business firms. In 1982, only sixteen dollars of every $10,000 in business receipts, less than two-tenths of one percent, came from black-owned firms. Black business receipts would have to increase seventy-five-fold before they would be proportionate to the black share of the total population. Perhaps present discrimination against minority businesses explains the persistence of some of this disparity.

R. Suggs, *Racial Discrimination in Business Transactions*, 42 Hastings Law Journal 1257, 1264 (1991) (footnotes omitted); *see also id.* at 1264 n.41 (noting that "[o]ther minorities also are underrepresented in business activity").

with annual receipts of $1 million or more were owned by minorities.[11] Partly as a result of these facts, minority unemployment consistently runs as much as double that of the rest of the population, and minority income and wealth lags far behind that of the majority.[12]

Minority-owned businesses have made significant progress in the area of federal procurement directly due to Congressional enactments. For example, in the 1970s the value of federal contracts awarded to minority firms amounted to less than 1% of the total. *See Fullilove*, 448 U.S. at 536 n.7 (Stevens, J., dissenting). Today, due to these programs, minority-owned businesses are awarded only 4% of the value of federal contracts.[13] This limited progress is the direct result of DBE provisions such as those challenged here; the fact that these provisions are working is evidence that they are still needed. Moreover, even with the DBE provisions, the percentage of federal contracts awarded to minority-owned businesses is still far below the percentage of minorities in the overall

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[11] *See* Bureau of the Census, U.S. Dep't of Commerce, Pub. No. ES87-3, 1987 Enterprise Statistics (cited in Note, *Fighting Construction Projects After Croson: A Title VI Litigation Strategy*, 101 Yale Law J. 1577, 1600 n.113 (1992)).

[12] The United States Census Bureau has reported that white households have more than 10 times the median wealth of African-American households. The median white household income also far exceeds that of African-American households. *See Huge Disparity in Wealth Found Among Races*, Wash. Post, Jan. 11, 1991, at A3, col. 1.

John Jacobs, the president of the National Urban League, commented that African-Americans are "not going to move toward a position of parity without increasing the wealth of [African-American] communiti[es] and we can't do that without doing something about . . . business ownership. . . . " *Id.* at A3, col. 3.

[13] *See* Commentary, *In the Minority: The 8(a) Program Isn't a Giveaway*, 13 Wash. Bus. J. 15 (week of Aug.12-18, 1994).



population (20%), and the percentage of minority businesses out of total U.S. businesses (9%).

Both Congress and the Executive Branch have recognized the need for continuing efforts to assist minority-owned businesses. For example, in 1988 Congress amended Section 502 to *strengthen* the DBE provisions by providing a minimum 5% government-wide goal for contracting with DBEs. Pub. L. No. 100-656, 1988 U.S.C.C.A.N. 102 Stat. 3881. Congress has also enacted a number of other statutes, one as recently as 1992, to provide similar DBE goals for specific agencies.[14] President Clinton, just a few months ago, issued Executive Order No. 12928 which recognized the continuing vital importance of these federal programs to assist DBEs. These facts decisively refute Petitioner's suggestion that Section 502 is a relic of the past.

In short, the problems that President Nixon first tried to address in 1969 with the § 8(a) program and that congress has attempted to address with numerous pieces of legislation from the 1970s to the present have not disappeared. These problems – such as poverty, high unemployment, lack of access to capital, and continuing job and lender discrimination – are with us today. Petitioner's attack on Section 502, if successful, would undermine the vital federal programs designed to redress these problems and reverse the progress that has been made in securing access by minorities and other disadvantaged

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[14] *See, e.g.*, Pub. L. No. 102-486, 1992 U.S.C.C.A.N. 106 Stat. 3133 (Department of Energy); Pub. L. No. 101-167, 1988 U.S.C.C.A.N. 103 Stat. 1249 (Agency for International Development); Pub. L. No. 99-661, 1987 U.S.C.C.A.N. 101 Stat. 1127 (Department of Defense); Pub. L. No. 101-510, 1990 U.S.C.C.A.N. 101 Stat. 1607 (Department of Defense); Pub. L. No. 101-507, 1990 U.S.C.C.A.N. 104 Stat. 1374 (Environmental Protection Agency); Pub. L. No. 101-144, 1989 U.S.C.C.A.N. 103 Stat. 863 (NASA).

persons to the free enterprise system in general and to the federal procurement system in particular, and in short order the basic causes of urban unrest (at least those that have been ameliorated by these programs) would be greatly exacerbated.

Congress is not required to make findings of discrimination by specific market, by specific industry or by specific agency, as have been variously suggested by Petitioner and its supporting amici.[15] *See Croson*, 448 U.S. at 504 ("Congress has made national findings that there has been discrimination in a host of fields"). However, NCMB notes that a major study was recently conducted regarding discrimination against minorities and women in the construction and professional design industries in the six county Metropolitan Statistical Area of Denver, Colorado.[16] This study concluded that "[t]here exists strong evidence of race and gender-based discrimination in the construction and professional design industries."[17]

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[15] For example, one amicus argues that "[a]t a minimum, the statistical evidence must: (1) relate to a defined and relevant market; (2) compare comparably qualified and available minority and non-minority firms within that market; (3) control for such race-neutral, market-relevant variables as firm size and experience; (4) calculate the disparity ratio for each minority group granted preferential treatment; and (5) identify, alone or in conjunction with anecdotal evidence, the discriminatory practices at fault in the relevant market." Brief Amicus Curiae of the Associated General Contractors of America, Inc., in Support of Petitioner at 19. Such standards are more reminiscent of an appellate court's review of a verdict in an antitrust action than of the deference due to Congress as a co-equal branch charged by the Constitution with the power to provide for the general welfare and to enforce the equal protection guarantees of the Fourteenth Amendment. *See Fullilove*, 448 U.S. at 472.

[16] Denver City Council, *Denver Disparity Study: Construction and Professional Design Services* (1990).

[17] *Id.* at ES-7.



This evidence included statistics showing that "[s]ubstantially fewer minority construction firms have been formed and survived than would be expected given the relative size of the minority construction work force."[18] In addition, the study accumulated considerable evidence of specific acts of discrimination as related in testimony, interviews and affidavits, such as:

> A minority was interviewed and supplied an affidavit which contained three very specific examples of race discrimination against his company. All of the examples involved discrimination by City officials. One example involved bid shopping to a majority-owned firm. A second involved a racial slur. The third involved retaliation for the filing of a complaint with the Affirmative Action Office. Certain pertinent facts set forth in the affidavit were verified by examination of detailed company records.[19]

In the final analysis, however, Congress' institutional competence and discretion to enact remedial legislation such as that at issue here does not depend on specific statistical studies or testimony regarding particular acts of discrimination. In the first place, "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478. More fundamentally, Congress' objective here is not simply to compensate individual victims of discrimination. Indeed, it would be impossible for Congress, or even a court, to determine exactly how and to what extent individuals have been

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[18] *Id.* at V11-2 to V-3; *see generally id.* at V1-6 to V1-11; V11-1 to V11-11.

[19] *Id.* at V11-2 to V-3; *see generally id.* at V1-6 to V1-11; V11-1 to V11-11.

injured by the type of society-wide discrimination Congress is attempting to remedy.[20]

Congress' primary objectives, as expressed in the Small Business Act itself, look toward the future benefits to all Americans of eliminating the barriers to full participation in our free enterprise system by socially and economically disadvantaged persons. *See* 15 U.S.C. § 631 (f)(1)(A). Achieving such full participation will not only be a major step in ending the hateful and hurtful legacy of racial and ethnic discrimination in this country, but will improve the functioning of the national economy, ameliorate the economic conditions of disadvantaged groups, increase competition in federal procurement and better equip this nation of diverse racial and ethnic groups to compete effectively in a truly diverse global economy. Any retreat from these noble (and as yet unfulfilled) objectives would be a disgrace to and a disaster for this nation.

## III. THE DBE PROVISIONS AT ISSUE HERE ARE MORE NARROWLY TAILORED AND FLEXIBLE THAN THE STATUTORY PROVISIONS UPHELD IN *FULLILOVE*

The argument that the DBE provisions of the Small Business Act raise greater constitutional concerns that the

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[20] *See generally*, George R. LaNoue & John Sullivan, *"But for" Discrimination: How Many Minority-Owned Businesses Would There Be?*, 24 Columbia Human Rights L. Rev. 293 (Winter 1992-93). Amici for Petitioner have cited this article favorably for its criticism of disparity studies such as that conducted in Denver. However, the real thesis of this article is that there is no way of proving how many minority-owned businesses would exist if discrimination had never occurred. The fact that this cannot be proved in a narrow judicial sense, however, does not mean that Congress is without competence to redress the effects of discrimination. On the contrary, it argues in favor of granting Congress a considerable degree of lattitude in choosing the means of redress.



MBE provisions upheld in *Fullilove* is simply unsupportable. On the contrary, as Justice Stevens pointed out in his *Fullilove* dissent, the truth is the exact opposite – merely considering race as a factor in determining disadvantage, as do the DBE provisions here, presents significantly *fewer* constitutional concerns than did the *Fullilove* statute:

> [T]he SBA's class of socially or economically disadvantaged persons neither included all persons in the racial class nor excluded all nonmembers of the racial class. Race was used as no more than a factor in identifying the class of the disadvantaged. The difference between the statutory quota involved in this case and the SBA's 1968 description of those whose businesses were to be assisted under § 8(a) of the Small Business Act is at least as great as the difference between the University of California's racial quota and the Harvard admissions system that Mr. Justice POWELL regarded as critical in *University of California Regents v. Bakke*, 483 U.S. 265, 315-318, 98 S. Ct. 2733, 2761-2763, 57 L. Ed. 2d 750.

*Fullilove*, 448 U.S. at 536 n.6 (Stevens, J., dissenting).

The 10% set-aside upheld in *Fullilove* applied solely to businesses owned by specified racial minorities. This provision was attacked both as underinclusive – since its benefits were not extended to all businesses that might be disadvantaged – and overinclusive – since its benefits might be received by some minority-owned businesses that were not really disadvantaged. *See Fullilove*, 448 U.S. at 485-87. Chief Justice Burger rejected the former argument on the ground that extending the statute to all disadvantaged persons was an appropriate function of Congress, not of the courts. *Id.* at 485. The Chief Justice rejected the latter argument on the ground that the administrative program implementing the MBE provisions contained sufficient flexibility to ensure that benefits would not go to "spurious minority-front entities" or

other MBEs that were not bona fide. *Id.* at 487-88. Moreover, a state or local government (although not a private contractor) could obtain a partial or total waiver of the 10% MBE set-aside if it could demonstrate that it was unable to achieve compliance despite its best efforts. *Id.* at 488.

As the court of appeals and district court correctly held, these standards demonstrate that the challenged DBE provisions here are narrowly tailored to achieve Congress' remedial objectives. Pet. App. 22-23, 35-56. Indeed, the DBE provisions are significantly better tailored and more flexible than the statute upheld in *Fullilove*.

*First*, unlike the *Fullilove* statute, the DBE provisions permit nonminority firms to qualify as DBEs.[21] 13 C.F.R. § 124.105(c). This is consistent with Congress' intent. *See* 1978 U.S.C.C.A.N. (92 Stat.) 3882. Firms owned by nonminorities (for example, white males who are physically disabled) have in fact been certified as DBEs by the Small Business Administration.[22]

Moreover, Petitioner is incorrect when it asserts that "only racial minorities . . . are entitled to a presumption of 'disadvantage'." Pet. Br. at 22. In fact, in the House Conference report to the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132, Congress expressed its intent that women (including nonminority women) also be included in the rebuttable presumption of disadvantage. H.R. Conf. Rep. No. 100-27, 100th Cong., 1st Sess., *reprinted in* 1987 U.S.C.C.A.N. 132. Consistent with this

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[21] The assertion by one amicus that "nonminorities may never qualify as DBEs" is simply incorrect. *See* Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 17.

[22] *See, e.g.*, Neil Munro, *8(a) Program Accused of Political Incorrectness*, 9 Wash. Tech. 1, 16 (Sept. 29, 1994).



intent, the Subcontracting Compensation Clause (SCC) at issue in this case indicates that women-owned businesses fall within the rebuttable presumption. *See* Joint App. at 14.

*Second*, unlike the statute in *Fullilove*, the DBE provisions here do not extend benefits to all firms genuinely owned by bona fide minorities. Although an individual who is a member of a minority group is presumed to be socially disadvantaged, this presumption is rebuttable. *See* 13 C.F.R. § 124.105(b) ("In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged . . . . "). If evidence exists "to the contrary," the ultimate question is whether the individual meets the definition of "socially disadvantaged," *i.e.*, those individuals "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5); 13 C.F.R. § 124.105(a).

Even if an individual is established to be socially disadvantaged, moreover, his or her firm does not automatically qualify as a DBE. In the first place, the firm must qualify as a small business concern within the meaning of the Small Business Act. 15 U.S.C. § 637(a)(4)(A); 13 C.F.R. § 124.102. Thus, a large business owned by a minority can never qualify as a DBE.

In the second place, the socially disadvantaged individual must also be *economically* disadvantaged in order to meet the requirements of the DBE program. 15 U.S.C. § 637(a)(6). In determining whether an individual is economically disadvantaged, the Small Business Administration will consider:

(1) the personal financial condition of the individual claiming disadvantage;
(2) the financial condition of the individual's firm; and
(3) the firm's access to credit, capital and markets.

13 C.F.R. § 124.106(a)(2).[23]

In short, it is simply not true to state, as Petitioner does, that "[t]he Small Business Act not only employs race as a factor, race is the only factor." Pet. Reply at 2. On the contrary, numerous factors are considered in making the determination of DBE status. Minority status is no guarantee of certification as a DBE; on the contrary, the Small Business Administration rejects many minority applicants for its 8(a) program.

*Finally*, the DBE requirements at issue here are at least as flexible as the *Fullilove* statute. Under Section 502 of the Small Business Act, each federal agency participates in setting its own annual goal for participation by DBEs. 15 U.S.C. § 644(g)(1). If the agency fails to meet its goal, it is required only to provide an "appropriate justification" for this failure in an annual report. 15 U.S.C. § 644(h)(1). There is no sanction for failing to meet a goal. Pet. App. 9 n.7. Thus, in essence each agency is free to grant itself a waiver of its own goal.

Moreover, unlike *Fullilove*, this case does not involve any obligation at all imposed upon private contractors. In *Fullilove* prime contractors were required to meet MBE subcontracting goals and did not even have the right to seek a waiver of these goals. In the case at bar no requirement at all has been imposed upon the prime contractor; it was merely offered an additional financial inducement to subcontract to DBEs. If the prime contractor did not wish to do so, it would still retain its contract at the price it had bid.

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[23] Similarly, under STURAA Congress has directed states to make DBE determinations based upon minimum uniform criteria including on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity and type of work preferred. Pub. L. No. 100-17, 101 Stat. 146 (1987).



Petitioner argues that Section 502 of the Small Business Act enforces a "near limitless preference" because each federal agency is directed to establish goals at a "maximum practicable" level. Pet. Br. at 40-41. In fact, this is a wholly speculative concern. There is no suggestion that any agency has set its goal at a level that exceeds or even approaches the percentage of socially and economically disadvantaged individuals in the population. If the day comes when it is "practicable" for an agency to do so, then Congress may very well decide that Section 502 and similar provisions are no longer necessary. Based on historical data, however, such an occurrence is not likely to occur anytime in the near future.

## IV. PRINCIPLES OF *STARE DECISIS* MILITATE AGAINST OVERRULING *FULLILOVE*

Accepting Petitioner's arguments in the case at bar would mean a radical reduction in the scope of Congress' authority to engage in remedial race-conscious measures, as the authority has been understood by Congress in the wake of *Fullilove* and subsequent decisions. *See* 1987 U.S.C.C.A.N. (101 Stat.) 76 (noting that the DBE provisions of the 1982 Surface Transportation Assistance Act and the 1987 STURAA were modeled on the statute found valid in *Fullilove*). Reversal of the court of appeals here would mean the explicit or implicit overruling of *Fullilove* and later decisions reaffirming it.

NCMB submits that these precedents should not be overruled not only because they were correctly decided in the first instance but because settled principles of *stare decisis* militate against it. In determining whether to overrule a prior holding, this Court's "judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to guage the respective costs of reaffirming and overruling a prior case." *Planned Parenthood v. Casey*, 112

S. Ct. 2791, 2808 (1992). These considerations require reaffirming, not overruling, *Fullilove*.

The most important consideration here is that of reliance, "which counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." *Planned Parenthood*, 112 S. Ct. at 2809. A major purpose of statutes such as Section 502 of the Small Business Act, the 8(a) program and the DBE provisions of STURAA is to encourage socially disadvantaged persons to form businesses and encourage certified DBEs to make substantial investments of time and money in expanding their operations. *See, e.g.*, 15 U.S.C. § 631(f)(1)(G).

In the 14 years since *Fullilove* was decided, thousands of DBEs, including many members of NCMB, have been formed. These DBE companies have invested many millions of dollars in their businesses in reliance upon the promises made to DBEs in the Small Business Act and other statutes. If it had not been for these statutes, and for this Court's decision in *Fullilove* upholding Congress' authority to enact such legislation, many DBEs would never have been created, and many investments would never have been made or would have been otherwise directed.

An example of the type of reasonable reliance induced by these statutes is provided by the 8(a) program, which is intended not only to help small disadvantaged businesses obtain federal contracts but also to provide such businesses with direct management, technical, and financial assistance. The 8(a) program recognizes that it takes many years of assistance before disadvantaged businesses are prepared to "graduate" and compete without 8(a) assistance. Congress has provided that participants may remain in the program for nine years. 15 U.S.C. § 636(j)(15). This represents an increase in the length of the program, which was previously five to seven years, because Congress recognized that a high



proportion of "graduated" 8(a) firms were failing. It is clear, therefore, that the precipitous withdrawal of assistance from 8(a) firms and other DBEs that have relied on federal assistance can and will have a devastating impact on their economic survival.

Other considerations also militate against overruling *Fullilove*. *Fullilove*'s holding has in no sense proven "unworkable." *See Planned Parenthood*, 112 S. Ct. at 2809. Far from creating many difficult cases, the standards contained in *Fullilove* provide Congress with an appropriate measure of flexibility and discretion in addressing the issue of past and present racial discrimination. The DBE provisions at issue here easily pass muster under these standards.

Indeed, it would be the overruling of *Fullilove* that could very well prove to be unworkable. Congress has wrestled with and continues to wrestle with the difficult policy issues concerning disadvantaged business enterprises, including how to define which persons are suffering the effect of discrimination, how to ensure that previously excluded groups receive a real opportunity for equal participation in the free enterprise system, how to direct benefits toward the truly disadvantaged and how to achieve all of this without imposing huge costs on the government procurement system. Petitioner and its amici would replace Congress' policy judgments on these issues with rigid rules of evidence that would lead to massive litigation and at the same time defeat Congress' remedial purposes. It would not be long before the chilling effect of overturning *Fullilove* would result in the reversal of more than 20 years of slow but steady progress in securing inclusion of minorities and women in the federal procurement system.

Another factor supporting reaffirmance of *Fullilove* is that no subsequent decisions have developed principles of law that undermine the original holding. *See Planned Parenthood*, 112 S. Ct at 2810. Petitioner argues that this

Court's holding in *Croson* undermines *Fullilove*, but in fact *Croson* went to great lengths to distinguish *Fullilove*, involving the power of Congress to engage in remedial race-conscious measures, from the issues presented by a state or local government's attempt to exercise such power. Moreover, *Metro Broadcasting* reaffirmed the applicability of *Fullilove*, rather than *Croson*, to race-conscious measures mandated by Congress.

Finally, the 14 years since *Fullilove* have not seen a change in the facts which underlay that decision. *See Planned Parenthood*, 110 S. Ct. at 2811. As already discussed, the effects of discrimination have not been eradicated. The overruling of *Fullilove* would certainly create the public perception that the only "fact" that has changed is the membership of the Court.

## CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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